DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-13/56245

PRELIMINARY RECITALS

Pursuant to a petition filed January 3, 2003, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Dane County Department of Human Services in regard to Medical Assistance (MA), a hearing was held on February 24, 2003, at Madison, Wisconsin. A hearing set for February 3, 2003, was rescheduled at the petitioner's request. Also, the hearing record was held open for 14 days for submission of documentation regarding the value of the real estate in question here.

The issue for determination is whether the county agency correctly determined that the petitioner is ineligible for institutional MA services due to divestment

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:	By:
(petitioner)	Atty. James Jaeger

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Kathy Keller, ES Supr.
Dane County Dept. of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of a nursing home in Dane County.

2. An MA application was filed on the petitioner's behalf on November 14, 2002. The county agency issued written notice of denial on November 25, 2002. See Exhibit 2. The basis for denial of institutional coverage was divestment of residential real property valued at $123,000. Based on this divested amount, the agency determined that the petitioner was subject to a transfer penalty period running from October, 2001, through April 30, 2004.

3. The petitioner has suffered from dementia from 1999 through the present time. A temporary guardian [JG] was appointed for her in October, 2002; JG became the permanent guardian on January 15, 2003.

4. Prior to October, 2001, the petitioner owned a single-family residence at (address), DeForest, Wisconsin. The home was then, and is now, in poor condition.

5. The petitioner previously lived in the house in DeForest. In October, 2001, the petitioner was residing in an assisted living facility in Minnesota. On October 24, 2001, the petitioner "sold" the DeForest house to her son [JT]. The alleged "purchase price" was $10,000; however, no compensation was given to the petitioner in exchange for the real property. The transfer was effectuated by a warranty deed, a copy of which is not in the hearing record.

6. The fair market value of the DeForest property in October, 2001, was $123,000.

7. The petitioner's only current income is Social Security of $691 per month. By November, 2001, the petitioner was residing in the Karmenta nursing home in Dane County. Because the facility was not being paid for its services, and it was getting no cooperation from the petitioner's children regarding either payment or qualification for MA, the home contacted Attorney Jaeger and asked him to look into the petitioner's need for guardianship as well as her MA eligibility status. He did so, and the instant MA application followed shortly thereafter.

DISCUSSION

The county agency denied the petitioner's November, 2002, MA application due to a divestment of real property. An initial concern on the agency's part regarding possible excess assets has been resolved, so excess assets are not a barrier to eligiblity. The petitioner argues that the divestment should not result in benefit disqualification due to "undue hardship".

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; *MA Handbook*, Appendix 14.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; *Handbook*, App. 14.3.0. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. *MA Handbook*, Appendix 14.5.0. In this case, the agency calculated a divestment of $123,000, with a disqualification period of 30 months, ending April 30, 2004.

Through no fault of the persons present at hearing (county personnel, the petitioner's guardian, and Attorney Jaeger), there is minimal information available regarding the "mechanics" of the divestment here. All are agreed that the petitioner, either personally or through her daughter/attorney-in-fact, transferred the DeForest property to JT in October, 2001. There is no evidence available to show that she received anything of value in exchange for this transfer. Attorney Jaeger has attempted to subpoena records regarding the transaction from Rapid Title, the entity that facilitated the transaction, without success. Based on the record before me, I conclude that the petitioner divested—i.e., she transferred the residence in October, 2001, for no compensation.

A secondary issue in this case is the determination of the fair market value of the divested property in October , 2001. The county agency used the figure of $123,000, which was verified by another county in which the petitioner had earlier applied unsuccessfully for benefits. At hearing, JG testified to seeing records that listed the assessed value of the property as being $100,300 in the year 2001. The record was held open for a possible submission regarding the value of the property at the time of sale; nothing was received. This administrative law judge (ALJ) then got the idea that she might be able to take administrative notice of government records regarding the value of the property through Dane County's website, http://accessdane.co.dane.wi.us. The website does list the property, with a 2003 value of $124,700 (copy attached hereto). As an aside, the website screen does not list the recording of any mortgage on the property. In any event, the current $124,700 assessed valuation appears more consistent with the county agency's $123,000 fair market value figure than does the $100,300 figure advanced on behalf of the petitioner. If the petitioner's representative has better documentation of the lower figure, she may wish to consider submitting it to me via the Rehearing process described below.

The more significant issue in this case is whether the entire divestment should be overlooked under one of two exception theories: (1) undue hardship to the petitioner, or (2) lack of intent to divest to qualify for MA due to theft of property by the petitioner's children. An undue hardship may be present when "the agency determines that denial of eligibility would … [create] a serious impairment to the institutionalized person's immediate health." *Medicaid Eligibility Management Handbook* (*MEMH*), Appendix 14.4.0. There is no dispute that the petitioner requires skilled nursing care. However, decisions from this office have looked at more than the petitioner's physical frailty in making "undue hardship" determinations. ALJs have also looked at the totality of the circumstances surrounding the divestment, to determine if the hardship was of the petitioner's own making. When the hardship was of the petitioner's own making, ALJs have found that an undue hardship exception to the transfer penalty period is not appropriate. See Decision MDV-18/54689 (Wis. Div. of Hearings & Appeals October 17, 2002). The hoped-for result in such scenarios is that the children who benefited from the divestment will be compelled to return the divested asset, which in turn will provide the patient with the ability to pay for her care. As will be elaborated upon below, I cannot conclude that the petitioner was not a contributor to the making of her own hardship.

The other exception theory under discussion is whether the petitioner has established that the divestment was **not** made with the intention of qualifying for MA. *MEMH*, Appendix 14.4.0, item #1. As above, a divestment deliberately made by the patient will usually not fit under this exception. I have issued a few decisions in which I concluded that where an incompetent patient had her money stolen from her by her children and/or attorney-in-fact, the patient did not intend to make any transfer at all—she was robbed. See Decision No. MED-13/50669 (Wis. Div. of Hearings & Appeals December 29, 2001). In such a "theft by POA" case, it is significant that the act of thievery was clearly committed by the POA (e.g., the POA signed the deed that gave the real property away) and that the thief has dissipated or hidden the divested asset.

For the purposes of this exception analysis, it is self-evidently important that the theft must have been performed by the child/POA without any complicity by the MA applicant. If the transfer occurred after the MA applicant became an adjudicated incompetent, there is no complicity by the applicant. Where there has not yet been such an adjudication, applicant complicity must be a case-specific determination. The problem in this case is that the petitioner, rather than the holder of the POA, may have executed the warranty deed that transferred the property (it is also not clear as to whether the POA document, which is not in the record, was "activated" at the time of the transfer). I am not prepared to say that the real property was stolen from the petitioner if she signed the deed giving it away.

In my opinion, the other consideration here is the status of the asset. Typically, in a "theft by POA" case, the stolen asset has been dissipated, significantly reduced in value, or rendered hopelessly inaccessible by

the thief. This is consistent with thievery. It is also relevant to the undue hardship argument that an asset cannot by recovered. However, the instant case is quite unusual in that the asset's whereabouts are known, unchanging, and within the county's borders. Similarly the value of the asset is known to be in six figures. There has to be leverage to force the asset's return to the applicant, or incentive to seek its recovery. Ignoring the existence of a large asset right under our noses is not consistent with the spirit of the divestment exceptions.

Finally, the petitioner's current representative argues that the petitioner had no intent to divest her property because she was living in an assisted living facility in Minnesota, and she merely wanted to give her son a place to live. There is no reason that the petitioner could not have allowed her son to live in the property while she retained its ownership. Thus, providing a place for her son to live is not a rationale for invoking the "no intent to divest and qualify for MA" exception.

CONCLUSIONS OF LAW

1. The petitioner divested $123,000 when she transferred real property to her son for no consideration in October, 2001.

2. Application of the transfer penalty period to this case does not work an undue hardship because the petitioner contributed to the creation of whatever hardship may ensue from the penalty period, and the divested asset can potentially be made available to pay for her care.

3. The "theft by POA" (i.e., the divestment was not made with the intention of qualifying for MA) exception does not apply here because the petitioner has not established that she was not the transferor of her own property, and the allegedly stolen asset can reasonably be recovered to pay for her care.

NOW, THEREFORE, it is **ORDERED**

That the petition herein be dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new/rehearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a rehearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 7th day of May, 2003

/sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
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